1998

The State of Utah v. Frank Madrid : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
FRANK MADRID,	:	Case No. 981404-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1995), and Attempted Theft, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-6-404 and 76-4-101 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

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ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE SUFFICIENCY OF THE EVIDENCE.

The State asserts in its brief ("S.B.") that Frank Madrid's ("Madrid") trial counsel was not ineffective although he failed to challenge the sufficiency of the evidence. See State v. Hovater, 914 P.2d 37, 39 (Utah 1996) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (setting forth analysis for ineffective assistance of counsel);see also Appellant's Brief ("A.B.") at Point I (providing analysis of Madrid's ineffective assistance argument). In support of its argument on appeal, the State, in part, contends that Madrid "relies upon incorrect law . . . [in citing] State v. Hill, 727 P.2d 221 (Utah 1986), for the proposition that when only circumstantial evidence is presented, the 'evidence supporting a conviction must preclude every reasonable hypothesis of innocence.'" S.B. at 12 (citing A.B.13; (quoting Hill, 727 P.2d at 222).[1]

[1] With regard to Madrid's claim of ineffective assistance of counsel, Madrid submits on his opening brief in response to points made in the State's brief which are not specifically addressed in this reply brief. See A.B. Point I.

Contrary to the State's assertion, however, the Hill analysis cited by Madrid, see A.B. 12-13, is not "incorrect law". S.B. 12. Rather, Hill provides the correct analytical framework for assessing the sufficiency of the circumstantial evidence presented at trial below. In making its argument, the State cites to State v. Lyman, 966 P.2d 278, 281 (Utah App. 1998) and State v. Blubaugh, 904 P.2d 688, 695 (Utah App. 1995), cert. denied 913 P.2d 7491 (Utah 1996), which provide that "'[t]he existence of one or more alternate reasonable hypotheses does not necessarily prevent the jury from concluding that defendant is guilty beyond a reasonable doubt.'" Lyman, 966 P.2d at 281 (quoting Blubaugh, 904 P.2d at 695).

A close reading of Blubaugh, the legal basis of Lyman, reveals that Hill is consistent with their holdings. Although Blubaugh states that circumstantial evidence need not preclude *every and any conceivable* theory of innocence, it still requires that such evidence preclude *reasonable* hypotheses of innocence. 904 P.2d at 694-95. Citing the Supreme Court's opinion in State v. Tanner, 675 P.2d 539 (Utah 1983) and an opinion from the Texas Court of Appeals, Huerta v. State, 635 S.W.2d 847 (Tex. Ct. App. 1982), the Blubaugh Court explained that "'[t]he rules of circumstantial evidence do not require that the circumstances should to a moral certainty actually exclude every hypothesis that the act may have been committed by another person, but the hypothesis intended is a reasonable one consistent with the circumstances and facts

proved.''" 904 P.2d at 695 (quoting Tanner, 675 P.2d at 550-51 (quoting Huerta, 635 S.W.2d at 851)).

In an earlier opinion, the Supreme Court in Tanner reinforced the need to preclude *reasonable* hypotheses of innocence, as opposed to *any and every* conceivable hypotheses of innocence.

> "To sustain a verdict based on circumstantial evidence, it is not necessary that such evidence exclude every possible doubt or theoretical supposition in no way related to the facts or circumstances of the case. *It is enough that such evidence exclude every reasonable hypothesis of innocence.*"

675 P.2d at 551 (emphasis added) (quoting Aldridge v. Mississippi, 398 So.2d 1308, 1311 (Miss. 1981)).

Hence, contrary to the State's assertion on appeal, the Hill analysis has not been superceded by this Court's opinions in Blubaugh and Lyman. Indeed, Hill, which likewise provides that circumstantial evidence must preclude *reasonable* hypotheses of innocence, 727 P.2d at 222, is consistent with the authority cited by the State. Hill is, therefore, the correct analytical framework for assessing the viability of a claim of insufficient evidence in this case and, in turn, whether Madrid's counsel rendered ineffective assistance in failing to make such a challenge before the trial court. See A.B. Point I.

To the extent that the circumstantial evidence in this case failed to preclude the reasonable hypothesis of Madrid's innocence, Hill, Blubaugh, and Lyman instruct that Madrid's convictions for burglary, Utah Code Ann. § 76-6-202 (1995), and attempted theft, Utah Code Ann. §§ 76-6-404 and 76-6-101 (1995), fail for

insufficient evidence. Hence, Madrid's trial counsel did not render effective assistance where he failed to challenge the sufficiency of the evidence. See A.B. Point I.

Specifically, as discussed in Madrid's opening brief, the circumstantial evidence presented below (the State did not present any direct evidence substantiating the allegations against Madrid), did not sufficiently foreclose the defense theory that Madrid was unaware of, nor in any measure an accomplice to, the burglary and attempted theft of the Paddock/Reeves home. See A.B. 12-18.

In addition, and contrary to the State's contention on appeal, case law discussing the sufficiency of the evidence in similar scenarios demonstrates the viability of a challenge to the sufficiency of the evidence in this case and, hence, defense counsel's ineffectiveness in failing to raise the challenge below. The State challenges Madrid's reliance upon the facts of Hill, 727 P.2d 221, and State v. Kalisz, 735 P.2d 60 (Utah 1987), two cases wherein convictions were overturned for insufficient circumstantial evidence. S.B. 13-15. The State argues in particular that Madrid is "tied more closely to the crime" than the defendants in Hill and Kalisz, noting that Madrid was parked in "Paddock's [parking] spot"; that defendant was near the burgled home, acting "presumably the lookout"; that defendant acted "in a suspicious manner" and then "left hurriedly with his unidentified co-perpetrator." S.B. 14-15.

In fact, the defendants in Hill and Kalisz bore as many, if not more, ties to the respective crimes than Madrid has with the

burglary and attempted theft of the Paddock/Reeves home. For example, in Hill, the defendant was placed at the scene of the crime, an antiques store, the day before the crime occurred and evidence established that he actually showed interest in the stolen items later found in his possession. 727 P.2d at 222. A statement of one other person, read into evidence by a testifying officer, also indicated that the defendant and another party conspired to take the items from the antiques store. Id.

Madrid, unlike the defendant in Hill, was not placed at the crime scene. He was in his own neighborhood, walking on the public sidewalk alongside the Paddock/Reeves house. R.110[127,161]. Moreover, there was no accomplice testimony linking Madrid to the crime; the other man seen jumping the fence was never identified or apprehended. R.100. Additionally, Madrid was not parked in "Paddock's parking spot" as the State suggests, S.B.14, for the evidence in no way suggests that there were assigned parking stalls in the residential neighborhood. Rather, the evidence shows that Madrid was parked legally on a city street in a place where, according to Paddock, he habitually parked. R.110[125]. In addition, Madrid had legitimate business in the neighborhood -- he was looking at a van that was down the street from the Paddock/Reeves home, and Madrid himself lived in the area. R.110[127,161]. The defendant in Hill, by contrast, had a more suspect connection to the crime scene insofar as he had no other business with the antiques shop other than looking at certain items that were for sale there and that were later found in his

possession. See 727 P.2d at 222.

The State likewise argues that Madrid's reliance on Kalisz is misplaced because, according to the State, the facts of Madrid's case more "strong[ly]" suggest guilt. S.B.15. However, the facts of the Kalisz case, where the Supreme Court overturned the defendant's aggravated robbery conviction for insufficient circumstantial evidence, actually parallel those of Madrid's case. Hence, Kalisz indicates that Madrid's defense counsel could have made a successful challenge to the sufficiency of the evidence and was ineffective for failing to do so.

Similar to the present case, the defendant in Kalisz was placed in a car with another party within hours of an aggravated robbery for which the other party was later apprehended. 735 P.2d at 61. Moreover, like Kalisz, incriminating evidence was not found on Madrid's person or in his possession. Id. If anything, the circumstances of Madrid's case are less compelling than those present in Kalisz because the defendant in Kalisz falsely reported to investigating officers that he took the person who committed the robbery to the hospital, a claim which could be construed by a jury as an attempt to cover his own involvement in the crime and explain away his suspicious affiliation with the perpetrator. Id. The evidence here does not suggest that Madrid ever made such a patently false and misleading claim to investigating officers in this case.

In short, the State's assertion that Madrid has closer ties with the burglary and attempted theft than the defendants in Hill

and Kalisz had with the respective crimes in those cases is unfounded. In reality, Hill and Kalisz reinforce the viability of a challenge to the sufficiency of the evidence insofar as the defendants in those cases had the same sort of connections with the crimes of which they were later acquitted on appeal. Indeed, in many respects, the evidence against those defendants was arguably more suspect than the evidence presented against Madrid. Yet, the Hill and Kalisz Courts held that the circumstantial evidence was not strong enough to support the jury convictions in those cases. See Hill, 727 P.2d at 223; Kalisz, 735 P.2d at 61. Where the evidence against Madrid was not as compelling as that in Hill and Kalisz, the viability of a challenge to the sufficiency of the evidence is established. In turn, defense counsel's failure to raise the issue below constitutes ineffective assistance. See A.B. Point I.

The State further cites State v. Bingham, 684 P.2d 43 (Utah 1984), State v. Ellis, 748 P.2d 188 (Utah 1987), and State v. McCullar, 674 P.2d 117 (Utah 1983) to bolster its position that trial counsel was not ineffective for failing to challenge the sufficiency of the evidence in Madrid's case. S.B.15-16. The State particularly notes these cases for the proposition that a defendant need not be directly placed at the scene of a crime in order to sustain a conviction against a challenge to the sufficiency of the evidence. Id.

However, the cases cited by the State are distinguishable from the circumstances of the case at bar. For instance, Bingham is

distinguishable because the defendant in that case was seen on the premises of the burgled home, albeit not in the home itself, running down the driveway with a stolen camera in his hand. 684 P.2d at 44. Madrid, on the other hand, was not spotted on the premises of the Paddock/Reeve's home, nor "running" away, Bingham, 684 P.2d at 44, as if to escape detection as the defendant in Bingham was doing. R.110[127-28]. Moreover, the evidence does not establish that Madrid had any incriminating evidence in hand, id., like the stolen camera that Bingham held as he ran down the driveway. 684 P.2d at 44. Indeed, Madrid was walking toward the Paddock/Reeve's home when he was noticed by Paddock on the sidewalk. R.110[127]. Hence, unlike the defendant in Bingham, Madrid was not acting in the sort of suspiciously elusive manner that would "permit[] the inference," Bingham, 684 P.2d at 46, that he was involved in the burglary and attempted theft at issue here.

McCullar is similarly distinctive from the present case. In McCullar, the evidence against the defendant consisted primarily of the testimony of two accomplices, which established that the defendant was one of two men who broke into the victims' home and took several items from the victims' at gunpoint. 674 P.2d at 118. The victims' testimony further corroborated the accomplice testimony insofar as they testified that two unidentifiable men broke into their home, one of them with a gun, bound the victims with duct tape and tipped a couch on top of them. Id. The victims further testified that the men then took several valuables from the home. Id.

Unlike McCullar, the evidence against Madrid does not consist of any such accomplice testimony implicating Madrid in the burglary and attempted theft at issue here. R.110. In fact, the man seen jumping the fence was never identified or apprehended and therefore was not available to testify at Madrid's trial. Id. Additionally, Paddock, the victim in this case, could not offer the same sort of detailed testimony that the victims in McCullar offered, indicating with the sort of certainty that there were two people involved in the burglary and attempted theft of his home. Rather, Paddock could only state that he saw Madrid walking along the sidewalk around the time he saw the other man jump the fence, that Madrid seemed in a panic when confronted by Paddock, and that Madrid and the other person drove off in the same car moments later. R.110[127-28]. Hence, Paddock's testimony about Madrid's connection to the crime not definitive about the involvement of two people, let alone conclusive about Madrid's alleged participation, and therefore distinguishable from the evidence in McCullar.

Finally, Ellis is similarly distinguishable from the case at bar. In Ellis, the defendant was caught in a car with another man driving slowly, then accelerating, past the scene of a burglary. 748 P.2d at 189. Madrid, by contrast, was not behaving in the same suspect manner as the defendant in Ellis until he met Paddock. R.110[127-28]. Specifically, Madrid was walking toward his car when he happened to meet Paddock on the sidewalk. Id. It was not until Paddock asked him in an accusatory manner why he was in the yard that his demeanor changed to what Paddock described as

"panicky." Id. Simultaneously, the other man was jumping the fence and running toward Madrid's car, a fact that must have alarmed Madrid even further and clued him into the fact that the other person was probably involved in criminal activity. R.110[126]. Hence, Madrid himself stepped up his pace to reach his car. R.110[128,130]; see also A.B.22-24 (discussing case law that states a suspects act of avoiding confrontation does not support inference in the similar context of a "reasonable suspicion" analysis).

In sum, the facts of Blubaugh, McCullar, and Ellis are stronger indications of guilt than the facts present in the case at bar. Hence, the inference that the defendants in those cases were guilty of the respective crimes alleged, despite the fact that none of them were directly placed at the scene of the crime, was more reasonable than the jury's guilty verdict in this case.

In light of the foregoing, defense counsel rendered ineffective assistance in failing to challenge the sufficiency of the evidence in Madrid's case. Such a challenge was not only viable, as demonstrated by other case law, but "there is a reasonable probability that the outcome of the trial would have been different." Hovater, 914 P.2d at 39 (citing Strickland, 466 U.S. at 694).

II. THE TRIAL COURT'S ERRONEOUS SUBMISSION OF THE FLIGHT INSTRUCTION AMOUNTS TO PREJUDICIAL ERROR.

The State contends on appeal that the trial court's submission of the flight instruction is supported by the evidence and, in any event, does not amount to prejudicial error requiring reversal in

this case. S.B. Point II. Madrid submits on his opening brief in support of his argument that the flight instruction is not supported by the evidence. See A.B.20-25. In response to the State's harmless error analysis, Madrid makes the following points:

The State primarily asserts that the instruction was "prejudice-proofed" insofar as it admonished the jury that it could infer guilt from flight only if the evidence supported such an inference. S.B.20; see also Addendum A (flight instruction no. 24). In support of its argument, the State cites four out-of-state cases which held that the giving of similar flight instructions did not merit reversal because they, too, admonished the jury that flight supported an inference of guilt only to the extent that the evidence established flight. S.B.20-21 (citing Leverett v. State, 333 S.E.2d 609, 610 (Ga. 1985); Commonwealth v. Brown,, 605 N.E.2d 837, 839 (Mass. 1993); State v. Abraham, 451 S.E.2d 131. 157 (N.C. 1994); State v. Cooke, 479 A.2d 727, 733 (R.I. 1984)).

Utah case law is silent on the mitigating effect such an admonition to the jury has on the prejudice effected by an erroneous flight instruction. Instead, as discussed in Madrid's opening brief, Utah law states only that an erroneous submission of a flight instruction may be harmless where the evidence against the defendant is otherwise strong. See A.B.26; State v. Bales, 675 P.2d 573, 576 (Utah 1983) (finding erroneous submission of flight instruction to be harmless where evidence provided "ample basis for conviction").

Assuming for the sake of argument only that an admonition to

the jury regarding the need for evidentiary support of flight does mitigate harm in this jurisdiction, the cases noted by the State, but for one, instruct that such an admonition renders the error harmless only where the evidence is otherwise strong. In and of itself, such an admonition does not cure prejudice.

For example, in Leverett, the evidence strongly supported the flight instruction. 333 S.E.2d at 610. The defendant was seen running down the street after shooting his victim. Id. A few moments later, the defendant encountered a police officer and shouted, "[c]ome on and lock me up. I . . . shot [two persons]." Id.

Likewise in Abraham, the North Carolina Supreme Court held that the contested flight instruction was supported in the evidence. 451 S.E.2d at 157. In that case, the defendants were seen by police walking away from the murder scene shortly after the shooting occurred. Id. at 156. As police approached the defendants, they took a detour across a parking lot. Id. Upon an officer's inquiry, the two defendants dubiously denied hearing any gunfire and continued to walk away. Id. Lastly, one of the defendant's was apprehended three weeks later in an apartment, hiding in a closet under a pile of clothes. Id. at 156-57.

Similarly in Cooke, the Supreme Court of Rhode Island held that the evidence justified the flight instruction. 479 A.2d at 733. The Court noted that the defendant, charged with arson, left the crime scene immediately after the fire started. Id. The Court further noted that defendant could not be found by his family for

ninety minutes thereafter. Id.[2]

Interestingly, the Cooke Court instructed that, in the future, trial courts were to include the four specific factors in their flight instructions to ensure that juries properly viewed and did not misuse flight evidence, as well as to minimize the risk of prejudice to defendants. Id. at 733. Those factors included the following four inferences: 1) that something that the defendant did led him to flee; 2) that the defendant fled out of a consciousness of guilt; 3) that defendant's consciousness of guilt derived from consciousness of guilt concerning the crime charged; 4) and that the defendant's consciousness of guilt regarding the crime charged reflects actual guilt for that crime. Id. (citing U.S. v. Meyers, 550 F.2d 1036, 1049 (5th Cir. 1997)).

These four inferences recommended by the Cooke Court are identical in substance to the four factors outlined in Madrid's opening brief in his discussion of the lack of the evidentiary support for the flight instruction erroneously submitted in this case. See A.B.22 (citing U.S. v. Levine, 5 F.3d 1100, 1107 (7th Cir. 1993), cert. denied 510 U.S. 1180, 114 S.Ct. 1224, 127 L.Ed.2d 569 (1994) (other citations omitted). However, these four factors were not outlined for the jury in the trial court's instruction,

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[2] But see Brown, 605 N.E.2d at 839. The Brown Court held that the submission of the contested flight instruction was error because it was not supported in evidence. Id. The Court nonetheless held that such error was not prejudicial because the jury was instructed that defendant's act of leaving the crime scene might nonetheless support an inference of guilt in general, and that it was the jury's prerogative to weigh such evidence. Id.

see Addendum A (flight instruction), which further undermines its efficacy in ensuring that the jury properly assessed the evidence as it related to flight in this case. In turn, the lack of these guidelines in the flight instruction compounds the prejudicial effect it had upon the jury's deliberations and its guilty verdict.[3]

In short, Leverett, Abraham, and Cooke actually instruct that an admonition to the jury is a factor in mitigation of harm only where the evidence otherwise strongly supports the flight instruction. In cases such as Madrid's, where the evidence of his flight, and indeed his guilt, is ambiguous, see Bales, 675 P.2d at 576 (instructing that erroneous admission of flight instruction is prejudicial where evidence of guilt is ambiguous), the fact that the instruction admonished the jury does not lessen its prejudicial effect. See A.B. Point II (explaining how evidence fails to justify flight instruction in particular, the ambiguity of the evidence going to Madrid's guilt in general, and the prejudicial effect of the flight instruction in light of these two factors). Accordingly, the State's contention that the instruction was "prejudice-proofed" is unfounded and does not justify affirmance of Madrid's burglary and attempted theft convictions.

CONCLUSION

In light of the foregoing and the arguments presented in

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3 In any event, similar guidance from this Court regarding the wisdom of including the four, abovementioned factors in a flight instruction might avoid future disputes over their propriety and prejudicial effect.

Madrid's opening brief, Madrid respectfully requests this Court to reverse the burglary and attempted theft convictions for insufficient evidence. Should the Court find sufficient evidence, Madrid requests that his convictions be reversed and the case remanded for a new trial on the basis that the trial court committed harmful error in giving a flight instruction that was not justified by the evidence.

ORAL ARGUMENT

Madrid respectfully requests oral argument on this matter.

SUBMITTED this 3rd day of August, 1999.

Catherine E. Lilly

CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 3rd day of August, 1999.

Catherine E. Lilly

CATHERINE E. LILLY

DELIVERED this _____ day of August, 1999.

ADDENDUM A

INSTRUCTION NO. 24

Flight or attempted flight, if any has been shown, of a person immediately after a crime has been committed, or after that person has been accused of a crime, is not enough alone to support a guilty verdict. However, you may certainly consider flight along with all of the other evidence during your deliberations.

Keep in mind that there may be legitimate reasons for a person to flee that are completely consistent with innocence. A person may flee because he or she feels guilty, but that feeling of guilt may stem from something other than the crime with which he or she has been charged. The jury must decide whether a person's flight constitutes evidence that the person committed the crime charged.